

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:
Petition of the
Town of Richlands, North Carolina
For Recertification to Regulate the Basic Cable
Service Rates of Charter Communications, Inc.,
d/b/a/ Falcon Cable Media
CSR-6431-R

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 2010

Released: May 14, 2010

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. The Town of Richlands, North Carolina (the "Town"), filed with the Commission a Petition for Recertification ("Petition"), pursuant to Section 623(a)(3) of the Communications Act of 1934, as amended ("Communications Act"), and Section 76.916 of the Commission's rules. The Petition asks for the recertification of the Town to regulate the rates for basic cable service of Charter Communications, Inc., d/b/a Falcon Cable Media ("Charter"), in Richlands, North Carolina. Charter claims that it is no longer subject to effective competition under Section 623(l)(1)(B) of the Communications Act. Charter filed an Opposition to Petition for Recertification ("Opposition"), and the Town filed a Reply to Opposition to Petition for Recertification ("Reply").

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 623(l)(1) of the Communications Act and Section 76.905 of the Commission's rules. A cable operator bears the burden of rebutting the presumption that effective competition does not exist in its franchise area with evidence that it does exist. In 2004, Charter sustained that burden and, in our Richlands Decertification decision, we granted its request that the Town be decertified to regulate its rates for basic service. Specifically, Charter satisfied the "competing provider" test for effective competition, which requires that (1) a cable operator's franchise area be served by at least two unaffiliated multichannel video program distributors ("MVPDs"), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (2) that the number of households subscribing to the programming services (the

1 47 U.S.C. § 543(a)(3).

2 47 C.F.R. § 76.916.

3 47 U.S.C. § 543(l)(1)(B).

4 47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.906.

5 47 U.S.C. § 543(l)(1).

6 47 C.F.R. § 76.905.

7 See 47 C.F.R. §§ 76.907(b).

8 Charter Commun., LLC, 19 FCC Rcd 7003, 7009 (2004) ("Richlands Decertification").

9 Id.

“penetration rate”) of MVPDs other than the largest one exceed 15 percent of the households in the franchise area.<sup>10</sup> Our decertification of the Town was based on the presence in Richlands of two Direct Broadcast Service (DBS) providers, DirecTV and EchoStar, meeting both these requirements. Concerning the second requirement in particular, we found that the DBS providers had achieved a penetration rate of 36.6 percent.<sup>11</sup> To arrive at this percentage and justify decertification, we relied on data supplied by Charter: five-digit zip code data<sup>12</sup> and 2000 Census data.<sup>13</sup>

3. Once we found that effective competition had been established, the Town was no longer authorized to regulate Charter’s basic service rates.<sup>14</sup> A local franchising authority such as the Town may petition the Commission for recertification, however, pursuant to Section 76.916 of the Commission’s rules.<sup>15</sup> Its petition must demonstrate that: (1) the franchising authority meets the requirements of Section 623(a)(3) of the Communications Act;<sup>16</sup> (2) the cable system for which it seeks recertification is not subject to effective competition; and (3) the reasons underlying the earlier decertification are no longer valid.<sup>17</sup> The issue before us is whether the Town’s Petition satisfies those criteria.

## II. DISCUSSION

4. Concerning whether competing provider effective competition still exists in Richlands, the Town’s Petition uses more recent and more sharply focused data than we relied on in our *Richlands Decertification* decision. Specifically, the Petition estimates the number of DBS subscribers not from five-digit zip code data, but from nine-digit zip code data obtained from the Satellite Broadcasting and Communications Association.<sup>18</sup> Also, the Petition estimates the number of households in Charter’s franchise area not from 2000 Census data, but from 2004 water utility records (“the number of residential households who are actively paying their water bills”).<sup>19</sup> The Town also includes households in an area that the Town annexed after 2000.<sup>20</sup> These data show 73 households subscribing to DBS service in a franchise area of 488 households, which makes for a DBS penetration rate of 14.959 percent.<sup>21</sup> This is just below minimum to support a finding of competing provider effective competition and decertification. If the Town’s data are probative and are all of the data that are relevant to the issues herein, then Charter’s cable system in Richlands is not subject to effective competition and the reasons underlying our 2004 *Richlands Decertification* decision are clearly no longer valid.

<sup>10</sup> 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

<sup>11</sup> *Richlands Decertification*, 19 FCC Rcd at 7009.

<sup>12</sup> *Richlands Decertification*, 19 FCC Rcd at 7006 ¶¶ 6-7; Petition at 2.

<sup>13</sup> *Richlands Decertification*, 19 FCC Rcd at 7005 ¶ 5; Petition at 2, 4 nn.12-13.

<sup>14</sup> 47 U.S.C. § 543(a)(2).

<sup>15</sup> 47 C.F.R. § 76.916.

<sup>16</sup> These requirements are, in brief, that the franchising authority certify in writing to the Commission that (1) it will adopt and administer basic rate regulations that are consistent with those prescribed by the Commission, (2) it has the legal authority to adopt, and the personnel to administer, such regulations, and (3) the franchising authority’s procedural laws and regulations provide a reasonable opportunity for consideration of the views of interested parties. 47 U.S.C. § 543(a)(3).

<sup>17</sup> 47 C.F.R. § 76.916(b). The latter showing must be “clear” and supported by objectively verifiable data or an affidavit. 47 C.F.R. § 76.916(b)(3).

<sup>18</sup> Petition at 3-4 & Exh. 2. Such data is also called “zip+4” or “5+4” data.

<sup>19</sup> Petition, Exh. 2 (Declaration of Richlands Town Administrator) at ¶ 3; *see also id.* at 3 n.9, 4. n.11.

<sup>20</sup> *Id.* at 4 nn.11, 13, Exh. 2 (Declaration of Richlands Town Administrator) at ¶ 4.

<sup>21</sup> *Id.* at 4.

5. Several challenges or adjustments to the Town's data can be made and, initially, we raise one on our own motion. The Town bases its estimate of households in Richlands on the number of residential households that are actively paying their water bills.<sup>22</sup> In one previous case, we rejected a showing of the number of households in a franchise area that was based on such water service data.<sup>23</sup> In that case, however, the cable operator objected to the use of such data and offered Census data instead and, on the facts of that case, we found Census data more reliable than water service data.<sup>24</sup> In this case, no Census data has been offered and Charter does not object, for purposes of this case, to the water service data.<sup>25</sup> Accordingly, in this instance we find more recent records of active water service in Richlands to be a reliable basis for measuring the number of households there. This holding is consistent with other decisions of ours in which we have accepted or rejected water service data based whether other, more reliable data was available.<sup>26</sup>

6. Both the Town and Charter propose adjustments to the data set forth in paragraph 4 above. The Town proposes to reduce its estimate of households subscribing to DBS service by 73. That, the Town states, is the number of "dual households," which subscribe to both DBS and cable services.<sup>27</sup> We reject this proposed adjustment. We have concluded that the statutory language of the competing provider test does not require such a reduction.<sup>28</sup> Also, a household that subscribes to DBS, even if it also subscribes to cable service, shows the existence of competition for cable service and thus represents the very essence of MVPD competition that Section 623 of the Communications Act wants to recognize and affirm.<sup>29</sup>

7. Charter, for its part, proposes a higher estimate of households subscribing to DBS service in Richlands. It alleges that it recently disconnected seventeen households in Richlands from its cable service, that typically some such households subscribe to DBS service, and that a visual inspection of the disconnected households showed that six had DBS dishes. Charter correctly observes that, if just one of them became a DBS subscriber after disconnection, then DBS penetration in Richlands would be in excess of 15 percent (15.16 percent, to be precise), thus continuing the existence of effective competition.<sup>30</sup>

8. The Town responds that just because Charter's inspection of the six households was recent does not mean that their subscription to DBS service was. The six households, the Town argues, may have subscribed to DBS service long before Charter disconnected their cable service. They may have been dual households, included in the Town's estimate of 73 subscribing to DBS.<sup>31</sup> The Town also argues that it is wrong for Charter to update data favorable to it (possible new DBS subscriptions) and not

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<sup>22</sup> See *supra* n.19.

<sup>23</sup> *Adelphia Cable Commun.* ("Adelphia"), 20 FCC Rcd 20487, 20490, ¶¶ 10-12 (2005).

<sup>24</sup> *Id.* at ¶ 12.

<sup>25</sup> Opposition at 1.

<sup>26</sup> *Mediacom Minnesota LLC* ("Mediacom"), 20 FCC Rcd 4984, 4987 (2005) ¶ 8 (water service and other data rejected in favor of Census data); *Beach Cable, Inc. v. Jones Spacelink, Ltd.*, 11 FCC Rcd 10390, 10393 ¶ 7, 10395-96 ¶ 13 (1996) (same); *Telecable of Radcliff, Inc.*, 10 FCC Rcd 1776, 1776-77 (1995) ¶¶ 4-5 (accepting data from the Water District and other sources where Census data was unavailable).

<sup>27</sup> Petition at 4-5.

<sup>28</sup> *Adelphia*, *supra* n.23, at ¶ 14; *Mediacom*, 20 FCC Rcd at 4988 ¶ 13.

<sup>29</sup> *Mediacom*, 20 FCC Rcd at 4988 ¶ 13.

<sup>30</sup> Opposition at 2 & Declaration of Mathew Favre (Charter's Vice President & General Manager) at ¶ 4.

<sup>31</sup> Reply at 1-3.

to update data that may not be (new households in Richlands and DBS subscribers canceling service).<sup>32</sup>

9. Both parties make valid points about whether we should make Charter's proposed adjustment. The Town is correct that Charter's evidence could have included more, such as information about when the six households obtained their DBS service. Nevertheless, we do not require that all relevant evidence be before us, or that the data that is before us be of unimpeachable quality. Rather, we entertain data that is relevant to the statutory tests for effective competition and, if we conclude that we have enough evidence to reach a competent and reasonable decision, we make a decision based on the evidence. We conclude that the evidence before us suffices for us to make a reasonable decision on the Petition. Specifically, we think it clearly likely that Charter is correct in claiming that at least one of the households disconnected by Charter reacted by becoming a DBS subscriber. That household causes DBS penetration in Richlands to "exceed[] 15 percent of the households in the franchise area," the minimum for the second prong of the statutory test for effective competition.<sup>33</sup> Accordingly, we conclude that the Town has not submitted sufficient evidence to demonstrate that Charter's cable system serving the Town is no longer subject to effective competition, and we deny the Petition.

### III. ORDERING CLAUSE

10. Accordingly, **IT IS ORDERED** that the petition filed by the Town of Richlands, North Carolina, for recertification **IS DENIED**.

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>34</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division, Media Bureau

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<sup>32</sup> Reply at 3 n.7. We assume that if there were new households in Richlands, the Town would have advised us of that, see *supra* n.20 & accompanying text.

<sup>33</sup> 47 U.S.C. § 543(l)(1)(B)(ii); 47 C.F.R. § 76.905(b)(2)(ii).

<sup>34</sup> 47 C.F.R. § 0.283.